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OSBORN v. THE BANK OF THE UNITED STATES.

THIS case, as it appears in 9 Wheat. 706, has always held rank as a leading case, and for several reasons : it contains one of the great opinions of our greatest Chief-Justice; it involved, as reported, the question of the amenability of State officers to judicial process and restraint when acting as such officers; it also involved the question of the right of a State to levy and collect a tax upon a branch of the Bank of the United States; and it involved other very interesting questions of constitutional and statutory law and construction.

The recent Virginia Coupon-Contempt cases, just argued [1] before the Supreme Court, have served to bring out the fact of which the writer, at least, had no previous knowledge, — that this case, as it appears in 9 Wheaton, is, as Mr. Bigelow says of Chandelor *v.* Lopus, referred to by Mr. McMurtrie in the last number of the HARVARD LAW REVIEW, *imperfectly reported;* and to such an extent that, by a curious process of *synecdoche*, an incident of that case has been made, for fifty years apparently, to stand for the whole. The highest authorities seem to have fallen into this error. Thus, in two recent celebrated cases in the Supreme Court of the United States, — United States *v.* Lee, 106 U.S., and Louisiana *v.* Jumel, 107 U.S., — Mr. Justice Miller, in the former case, referring to Osborn *v.* Bank as "a leading case, remarkable in many respects," describes it as a case which decided that "the decree of the Circuit Court ordering the restitution of money" seized by Osborn or his agent, Harper, from the vaults of the bank, was correct (page 214); and Mr. Chief-Justice Waite, in the latter case, refers to it as a case in which "the principle applied in the decision is thus stated in the head-note of the report: 'A Court of equity will interpose by injunction to prevent the transfer of a specific thing, which, if transferred, will be irretrievably lost to the owner.'"

The importance of this case as an authority in the Virginia cases led the counsel for the bondholders to examine the original record of the case as it lies in the archives of the Supreme Court,

[1] The opinion in these cases has since been delivered, and will be noticed as soon as it is printed. — EDS.

and it was printed and placed in the hands of the Court upon the recent argument, as well as on the argument in the Court below. The correct statement of the case will be of interest, I think, to the profession at large.

The original bill in the Court below, filed at the September term, 1819, prayed for an injunction against Osborn, Auditor of the State, to restrain him from carrying into execution the provisions of an Act of the Legislature of Ohio, which directed the levy and collection of a tax from all banks transacting business in that State, which, of course, included the branch of the United States Bank, — as the auditor threatened to do. The injunction was awarded in the Court below, and both the subpœna and injunction were issued and served under this bill on Osborn and his agent, Harper.

In September, 1820, leave was given to file a supplemental and amended bill and to make new parties. The amended bill charged that subsequent to the service of the subpœna and injunction on the 17th of September, 1819, Harper, who was employed by Osborn to collect the tax, proceeded to the office of the bank at Chillicothe, and by violence seized $100,000 belonging to, or on deposit with, the bank ; and that the same had then been delivered to Curry, Treasurer of the State, who, in turn, had delivered it to Sullivan, his successor. The bill prayed that Curry, Sullivan, Osborn, and Harper be made defendants, and be decreed to restore the same, *and be enjoined from proceeding further under said Act.*

On September 5, 1821, the Circuit Court made its final decree upon the bill and amended bill, the answers of the defendants Curry and Sullivan, and the exhibits ; whereby the bill and amended bill, as to Osborn and Harper, were taken for confessed, and thereupon it was adjudged, ordered, and decreed that the defendants, or some of them, pay over and deliver to the complainants the sum of $100,000, being the same which was seized and taken from the complainants, with interest thereon from the 17th day of September, 1819, until paid ; and it was further adjudged, ordered, and decreed that "the defendants, and each of them, be perpetually enjoined from proceeding to collect any tax which has accrued, or may hereafter accrue, from the complainants under the Act of the General Assembly of Ohio, in the bill and proceedings mentioned."

Mr. Wheaton's report upon this point says only (page 743):

"The cause came on to be heard upon these answers, and upon the decrees *nisi* against Osborn and Harper, and the Court pronounced a decree directing them to restore to the Bank the sum of $100,000, with interest on $19,830, the amount of specie in the hands of Sullivan. The cause was then brought by appeal to this Court."

The truth is, as has been stated, that the Court below pronounced a decree which, in terms, after decreeing the return of the sum of $100,000, with interest upon a part thereof, decreed specifically a perpetual injunction against further proceedings under the Act of the Legislature of Ohio, which was drawn in question.

The result of the affirmance of the decree in Osborn *v.* Bank, by the Supreme Court of the United States, is, therefore,—

First: That an injunction will be granted to enjoin State officers from executing an unconstitutional State statute, where complainants show a proper interest therein; and,

Second: That when, in the course of the execution of such a statute by such State officers, specific funds have been seized by such State officers, and will be lost to the owner if transferred, an injunction will go to prevent such transfer.

That this was the scope and effect of Osborn *v.* Bank is clear beyond question, not only upon the record, but upon the opinion of Chief-Justice Marshall, wherein, under the fifth head, he discusses the question whether "the case made in the bill warrants the interference of a Court of Chancery," and in which he states the question as follows (page 838) : —

"The true inquiry is, whether an injunction can be issued to restrain a person who is a State officer from performing any official Act enjoined by statute; and whether a Court of equity can decree restitution if the Act be performed?" Both these questions were answered in Osborn *v.* Bank by Chief-Justice Marshall in the affirmative, but the answer to the first is the leading thought and conclusion of the case and the opinion.

It is to be hoped that, in some way, the report of this great case may be so amended or supplemented as to bring out clearly its full scope and most important feature.

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